



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-40/50595

PRELIMINARY RECITALS

Pursuant to a petition filed September 21, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on November 1, 2001, at Milwaukee, Wisconsin.

The issue for determination is whether the community spouse's income allocation may be increased.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

Milina Zakula, Medicaid billing specialist

Luther Manor

4545 North 92nd Street

Milwaukee, WI 53225

Wisconsin Department of Workforce Development

Bureau of Workforce Programs

201 East Washington Avenue

P.O. Box 7935

Madison, WI 53707-7935 Wisconsin Department of Health and Family Services

Division of Health Care Financing

1 West Wilson Street, Room 250

P.O. Box 309

Madison, WI 53707-0309

By: Tania McCarthy, ESS, ESS

Milwaukee County Dept Of Human Services

1220 W. Vliet St, 3rd Floor

Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, Cares #xxxxxxx) is a resident of a Luther Manor Health Care Center (nursing home) in Milwaukee County. Her husband resides in the "community" in one of Luther Manor's independent living apartments.
2. Petitioner's monthly income is \$1,624.16 including \$443 in Social Security, and \$1,181.16 from three annuities (\$230.98, \$125.70 and \$824.48). See Exhibits 1 & 2. Her husband has monthly income of \$2,472.37 including \$974.00 in Social Security, and \$1,498.37 from four annuities (\$824.48, \$340.16, \$192.84, and \$140.89). See Exhibits 1 & 2.
3. On September 21, 2001, petitioner requested an increase in the income allocation to her husband as the community spouse. The county agency sent an October 18, 2001 Notice of Decision which determined the allocation to the community spouse to be \$2,175 or \$1,935 plus excess shelter allowance. The petitioner's cost of care contribution was determined to be \$1,407.89. See Exhibit 6. This notice indicated how the cost of care contribution had been calculated.
4. The petitioner's does have significant excess shelter expenses per the MA Handbook, sec. 23.6.0 as his monthly rent at his Luther Manor independent living apartment is \$1,446.50. See Exhibit 4. \$1,446.50 is \$866 above the \$580.50 point at which excess shelter cost begins.
5. Petitioner filed this appeal challenging the amount of her cost of care contribution, and seeking an increase in her husband's income allocation.
6. Petitioner's husband established that he has basic and necessary monthly expenses totaling \$3,523.45. See Exhibit 4. The county agency stipulated that all of (husband)'s expenses in Exhibit 4 were basic and reasonable monthly expenses.

DISCUSSION

The federal Medicare Catastrophic Coverage Act of 1988 included extensive changes in State Medicaid eligibility determinations as they relate to spousal impoverishment where one spouse is a resident in a nursing home. The purpose of the new act was to protect a "community" spouse's assets and resources and designate how a spousal share would be computed. The Act also established a new minimum needs allowance for the community spouse at a specified percentage of the federal poverty line. Consequently the Wisconsin Legislature enacted sec. 49.455, Wis. Stats. in order to bring the Wisconsin Medicaid program into conformity with federal law. Section 49.455 specifically states that the department is to use the criteria of that statutory section in determining the eligibility for medical assistance under §49.46 or 49.47, Wis. Stats. and the required contribution toward the care of an institutionalized spouse.

"Community spouse" refers to the person who is married to an institutionalized individual. See sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. See sec. 49.455(3), Wis. Stats. However, after an institutionalized person is found eligible for medical assistance (MA), he or she may allocate income to the community spouse.

If the community spouse's monthly income is below a certain amount, the institutionalized spouse may allocate some of his or her income to bring the community spouse's income up to that amount. That amount is the lesser of \$2,175 or \$1,935.00 plus an excess shelter allowance. In this case, sec. 49.455(4)(c), Wis. Stats., the Medical Assistance Handbook, Appendix 23.6.0. (1-1-01 edition), and sec. 49.455(4)(b), Wis. Stats., allow an increase in the monthly community spouse allotment by order of a fair hearing examiner or a court. See also MA Handbook, Appendix 23.6.0. In order to increase the allotment, the examiner must find exceptional circumstances resulting in financial duress. See sec. 49.455(8)(c), Stats.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for a Hearing Officer to use expenses, they must meet "necessary and basic maintenance needs" MA Handbook, Appendix 23.6.0. "Income Allocation". This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". Sec. 49.455(8)(c), Stats., (emphasis added.) Because the community spouse is essentially asking state taxpayers to give the nursing home or group home resident more welfare in the form of MA, I do not think that every expense is automatically appropriate for inclusion, even if it is not frivolous. However, in this case, petitioner's entire list of monthly expenses are basic and necessary and the county agency agreed that (husband)'s monthly expenses were reasonable and necessary.

Sec. 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s.13964-5 (MCCA). Among other thing, the "spousal impoverishment" provisions at sec. 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. That allowance is currently set, for purposes of this discussion, at \$2,175. See MA Handbook, Appendix 23.6.0 (1-1-01). The institutionalized person may divert some of his income to his community spouse rather than contributing to his cost of care. The amount of the diverted income, when combined with the spouse's income, cannot exceed the maximum allocation.

A fair hearing officer can grant an exception to this limit on income diversion. The hearing officer does not have unfettered discretion in creating an exception to the maximum allocation ceiling, however. The relevant statutory provision states that the test for exception is as follows:

(c) If either spouse establishes at a fair hearing that, due to exceptional circumstances resulting in financial duress, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

Sec. 49.455(8)(c), Stats, emphasis added. Thus a hearing officer may augment the maximum allocation ceiling only by amounts needed to alleviate financial duress, to allow the community spouse to meet necessary and basic maintenance needs. During the hearing, the county agency did not dispute that the petitioner's husband needed an increase in his minimum monthly maintenance due to his high expenses for rent, prescriptions and other non-reimbursed medical needs.

During the hearing, the petitioner's husband has established that he has basic and necessary expenses of \$3,523.45. See Exhibit 4. Those expenses of \$3,523.45 are significantly over (husband)'s income allocation of \$2,175. Therefore, I conclude that (husband)'s circumstances warrant an increase in his community spouse income allocation from \$2,175 to \$3,523.45. These changes are retroactive to petitioner's date that she requested the increased income allocation to her husband (September 21, 2001).

CONCLUSIONS OF LAW

The basic and necessary expenses of petitioner's husband warrant an increase in his income allotment to \$3,523.45 retroactive to September 21, 2001.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county with instructions to: a) increase the income allotment to the petitioner's husband to \$3,523.45; and b) reduce the petitioner's cost of care contribution (patient liability) based upon the increased income allocation to the community spouse, within 10 days of the date of this Decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 12th day of
November, 2001

/sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
1121/GMW

cc: Ann Blewett - Milw. Co. - e-mail
Rita Cairnes
Eva Davis - Milw. Co.
Joyce Goesser - Milw. Co. - e-mail
Ruby Jackson - Milw. Co. - e-mail
Belinda Mosley - Milw. Co. - e-mail
Geneva Taylor - Milw. Co.
Susan Wood